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Supreme Court, U.S.
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(128-B)

IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1685~~ 70-151

Proceeding No. 1
In the Matter of the Application
of
JOHN J. KRAEMER, individually and as President of Council 50, AFL-CIO, on behalf of himself and others similarly situated,

Petitioner,

for a judgment under Article 78 of the Civil Practice Law and Rules,

against

PUBLIC EMPLOYMENT RELATIONS BOARD, OFFICE OF EMPLOYEE RELATIONS, COMPTROLLER OF THE STATE OF NEW YORK, and THE STATE OF NEW YORK, and the CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Respondents.

Proceeding No. 2
In the Matter of the Application
of
JOHN J. KRAEMER, individually and as President of Council 50, AFL-CIO, on behalf of himself and others similarly situated, and COUNCIL 50, AFL-CIO,

Petitioner,

for a judgment under Article 78 of the Civil Practice Law and Rules,

against

OFFICE OF EMPLOYEE RELATIONS, COMPTROLLER OF THE STATE OF NEW YORK, and THE STATE OF NEW YORK, PUBLIC EMPLOYMENT RELATIONS BOARD and the CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Statement of the Case

Since the passage of the New York Public Employees' Fair Employment Act, commonly known as the Taylor Law (Laws of New York, 1967, ch. 392), employees of the State of New York have been grouped into appropriate collective negotiating units as a result of proceedings before the New York State Public Employment Relations Board (PERB).

Following representation elections held during the summer of 1969, the New York Civil Service Employees' Association, Inc. (CSEA) was certified by PERB on September 22, 1969, as the collective negotiating representative of employees in four of the five units involved. Council 50, AFL-CIO, was a defeated contestant in all four elections. Council 82, AFSCME, was the winner in the fifth unit.

Following certification, the State and CSEA entered into collective negotiations and on January 6, 1970, they reached a tentative agreement with respect to each of the four negotiating units. Each of the tentative agreements contained the following provision:

> "CSEA shall have exclusive payroll deduction of membership dues and insurance premiums for employees and no other organization shall be accorded any such payroll deduction privilege".

Pursuant to § 208 of the New York Civil Service Law, a public employer "shall extend to an employee organization certified * * * pursuant to this article the following rights * * * (b) to membership dues deduction, upon presentation of dues deduction authorization cards signed by individual employees * * *".

Contracts relating to each of the four units were executed by the State and CSEA on April 20, 1970, and the

provision quoted above, granting exclusive dues deduction privileges to CSEA, appears as § 4.2 of each of such agreements. Following announcement of the tentative agreements and before execution of the contracts, petitioners commenced two separate proceedings under Article 78 of the New York Civil Practice Law and Rules the first relating solely to deduction of insurance premiums and the second relating to deduction of membership dues, seeking judgments declaring that the respondents lacked authority to grant exclusive privileges of payroll deductions to CSEA.

The two proceedings came on for argument together, at a Special Term of the Supreme Court, in the County of Albany, New York and a single judgment was rendered dismissing both petitions. The Court found authority for respondents' actions in Section 6a(2) of the New York State Finance Law, § 654 of the New York Executive Law and § 208 of the New York Civil Service Law and in the decision of the New York State Court of Appeals in *Matter of Bauch* v. *City of New York*, 21 N Y 2d 599 [1968], cert. den. 393 U. S. 834. The judgment was unanimously affirmed on appeal to the New York Appellate Division, Third Judicial Department (Reported in 35 N. Y. A. D. 2d 297). Petitioners appealed to the New York Court of Appeals as a matter of right, on constitutional grounds —equal protection and due process of law. The appeal was dismissed for lack of a substantial constitutional question, again on the authority of *Matter of Bauch*; *supra* (28 N Y 2d 717 [1971]). Thereafter, a motion by petitioners to the New York Court of Appeals for permission to appeal was denied.

Opinions Below

The Memorandum-Decision of Justice RUSSELL G. HUNT at Special Term of the Supreme Court, County of Albany, New York is set forth in the Appendix to the Petition for Certiorari, page A2. The opinion of the New York Appellate Division, Third Judicial Department is set forth at page A5 of the Appendix to the Petition.

Questions Presented

1. Have the petitioners established, as a matter of fact, that they ever had a valid and subsisting insurance premium deduction privilege?

The New York Courts held: "No".

2. May the respondents grant and give effect to an exclusive payroll deduction privilege to the employee organization selected by a majority of State employees to represent them?

The New York Courts held: "Yes".

Reasons for Denying Certiorari

A

The petition herein seeks review of the above-entitled Proceeding No. 1 only. While the two proceedings involve the same issue of law, the first relates, on the surface, to payroll deductions ("checkoff") of insurance premiums for union members while the second relates to the checkoff of union membership dues. In fact, however, as found at Special Term of the Supreme Court, Albany County, there is no essential difference between the two proceedings because petitioner's union never acquired a valid, subsisting insurance premium deduction privilege from the defendant State Comptroller. The Court said:

> "It appears that the Comptroller has never deducted insurance premiums, as such, but, has deducted members' dues and remitted to the Council. The latter has turned over part of the dues to an insurance fund set up by the Council and the balance was retained by it for its general purposes." (Appendix to Petition, p. A3.)

In affirming the decision at Special Term, the New York Appellate Division made no separate finding of fact as to whether or not petitioner's union had a valid insurance premium deduction privilege. Instead, it treated the issue of law raised in both proceedings as applicable to insurance premium deductions as well as to membership dues deduction. Because the petitioner has elected, however, in the petition, to apply for review solely on the question of insurance premium deductions, we submit that the finding of fact that the union had no such deduction privilege remains undisturbed and, accordingly, that the legal question sought to be posed is academic. This Court has declared its policy not to consider academic questions (*Rice v. Sioux City Cemetery*, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 [1954]).

The pleadings which instituted this proceeding clearly indicate that the New York State Comptroller deducts the sum of $2.50 bi-weekly from the salary of every Council 50 member upon the authority of a signed payroll deduction card. However, as appears by the affidavit of Vincent J. McArdle, Director of Machine Audit, New York State Department of Audit & Control attached to respondents' Answer below (and reproduced here as Appendix "A") only the top half of the card (the part entitled "Dues—Payroll Deduction Authority") is actually filed with the Comptroller. Upon such authority the Comptroller deducts the sum of $2.50 bi-weekly from the paycheck of

every Council 50 member, without exception, and without any knowledge or concern as to whether or not such member desires or is interested in insurance benefits. The entire amount withheld is transmitted to Council 50, to be used in whatever manner Council 50 may determine.

Petitioners assert, of course, and we need not dispute the fact that the sum of 80 cents is segregated from the bi-weekly dues of each member by Council 50 to be applied to the payment of insurance premiums. This action, in which the Comptroller does not participate and of which he has no official knowledge, does not operate to convert petitioners' dues checkoff into an insurance premium deduction.

B

Petitioners argue that the privilege of payroll deductions granted exclusively to the certified or recognized employee organization, representing a majority of employees, and denied to minority organizations, is a violation of Equal Protection of the Law.

It is well established, however, that in order to be found unconstitutional, a statutory classification among individuals or groups which results in less than equal treatment must constitute "invidious discrimination" lacking a reasonable basis and a permissable objective. (*Williamson* v. *Lee Optical Co.*, 348 U. S. 483 [1954]; *N. Y. Central R. R. Co.* v. *Lefkowitz*, 46 New York Misc 2d 68, mod 28 New York A D 2d 735, affd. 23 N Y 2d 1, [1968], cert. den. 393 U. S. 536). The law does not require that all public facilities be made available equally to all citizens. It does require, however, that any classification which may be made not be invidiously discriminatory. In that light, the cases cited by petitioners are inapplicable. In *Rinaldi* v. *Yeager*

(384 U. S. 305 [1965]) for example, this Court did not hold that transcripts of criminal trials must be made available to all would-be appellants, free of charge, or even that if there is no charge to successful appellants there can be no charge to unsuccessful appellants. Rather, it held that the State of New Jersey could not impose the charge upon unsuccessful appellants who are held in prison and permit unsuccessful appellants who are at liberty (*e. g.* having received a suspended sentence, probation or a fine only) to escape payment. The distinction was obviously discriminatory.

In *Brown* v. *Louisiana* (383 U. S. 131 [19]) the petitioners were effectively denied the use of facilities which were concededly and undoubtedly public—a public library. The decision did not turn on whether or not the petitioners were *entitled* to use the library facilities but, instead, on whether or not they had actually violated a specific "breach of peace" statute and, if so, whether such statute was unconstitutional.

In the present case, a distinction or classification is made between that organization elected by a majority of employees to be their representative and other organizations with lesser, scattered support. Council 50 had an equal opportunity in each of the four negotiating units to become the certified representative, but failed to gain majority support. Having lost the elections, petitioners now complain that they are not accorded equal treatment with the victor.

Thus, the basis for the distinction, we submit, is obvious and reasonable. Its objective is to promote stability and harmony in employee relations by providing to the certified representative certain prerequisites and advantages. The

efficacy of granting such exclusive privileges to the bargaining representative in the interest of stable and harmonious relations has been proven through decades of history in the labor field.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Dated: Albany, New York, June 1, 1971.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Respondents

RUTH KESSLER TOCH
Solicitor General

JOHN Q. DRISCOLL
Assistant Attorney General

of Counsel

APPENDIX "A"

Affidavit of Vincent J. McArdle, Read in Opposition to Order to Show Cause

SUPREME COURT—STATE OF NEW YORK
COUNTY OF ALBANY

[SAME TITLE]

State of New York
County of Albany—ss

VINCENT J. MCARDLE, being duly sworn deposes and says:

That I am over the age of 21 years and employed as Director of Machine Audit in the New York State Department of Audit and Control.

That in my employment I am charged with the supervision and auditing of payroll deductions from the salaries of State employees, including those voluntary deductions, such as the dues check-off, for which specific written authorization by the employee is required.

That I have examined Exhibit I attached to the petition in the above proceeding and am familiar with the same to the extent which follows:

That the upper half of the form which comprises the exhibit, bearing the heading Dues-Payroll Deduction Authority, and only the upper half, ending at the broken line or perforation immediately below the "Signature of Employee", is filed with the Comptroller of the State of New York and received in my office as authority for payroll deductions.

/s/ VINCENT J. MCARDLE

(Sworn to by Vincent J. McArdle, April 15, 1970)

APPENDIX "A".

PRINT

Last Name	1st Name	Middle Initial	Dept.
Street Address	City	Item No.	Div. or Inst.

DUES

PAYROLL DEDUCTION AUTHORITY

NEW YORK STATE EMPLOYEES COUNCIL 50 (AFSCME) AFL-CIO
17 Dove Street Albany, New York 12210

To the Comptroller of the State of New York:

I, the undersigned do hereby authorize you to deduct from my salary bi-weekly the amount of two dollars and fifty cents ($2.50) for the payment of union dues (Chapter 934, Laws of 1956) and to make any adjustment necessary for the purpose of payment of dues in the amount certified by New York State Employees Council No. 50. If I am not now, or shall in the future cease to be paid on a bi-weekly basis, I authorize you to deduct the amount necessary for payment of my union dues. I understand that this order may be revoked at any time by written notice to you.

AUTHORIZATION FOR REPRESENTATION

I designate Council 50, AFSCME as my sole and exclusive representative for the purpose of negotiating collectively on all matters pertaining to my wages, and/or salary, hours, terms and conditions of employment including the determination of and administration of grievances arising under the terms and conditions of my employment.

Job Title _____ Date _____ Signature of Employee _____

Last Name ..... First Name ..... Middle Initial ..... Local No. .....

Address City, Zone, State Date of Birth (month, day and year)

Name of Beneficiary ..... Relationship .....

Address (Street, City, Zone & State) .....

CHECK ONE BOX ONLY—YOU ARE ELIGIBLE FOR ONLY ONE PLAN:

☐ DEATH BENEFIT PLAN ($1000 first year, $2000 second year, $3000 third year)
☐ SICKNESS & ACCIDENT PLAN ($20 per week for 26 weeks)

Date ..... Signature (Do not print) .....

EXHIBIT I

BEST AVAILABLE COPY